In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-964

ONE 1973 CADILLAC FLEETWOOD, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the government failed to show probable cause that the vehicle in question had been used to facilitate the transportation and possession of counterfeit obligations and that the statute under which forfeiture occurred, 49 U.S.C. 781, is unconstitutional.

After a non-jury civil forfeiture proceeding in the United States District Court for the Eastern District of Arkansas, the court found that the petitioner vehicle, claimed by petitioner Howard, had been used to facilitate the transportation and possession of counterfeit obligations, in violation of 49 U.S.C. 781; it accordingly ordered the vehicle forfeited to the United States. The court of appeals affirmed (Pet. Exh. A).

The evidence showed, and the trial judge found, that petitioner Howard's Cadillac was unlawfully used in January and March 1973 to facilitate the possession and

transportation of counterfeit $20 bills. Amon White testified that on or about January 26, 1973, while in Howard's new, light-colored Cadillac (Tr. 53-61), he purchased $5,000 worth of counterfeit obligations from petitioner Howard. The government showed that on September 29, 1972, Howard traded in his older Cadillac and purchased the car that is the subject of this forfeiture action (Tr. 69-70).

Howard claimed that the sale to White never occurred (Tr. 119). In support of his contention Sula McElroy, a registered nurse and personal friend of Howard, testified that he was ill and confined to his home for the two weeks prior to his brief hospitalization commencing on January 28, 1973 (Tr. 146-150).

On the morning of March 16, 1973, William Carter, an informant, introduced Joseph Saitta, an undercover United States Secret Service agent, to petitioner Howard at the Broadway Restaurant, where petitioner informed Saitta that he had $1 million in counterfeit $20 bills (Tr. 8-10). Since Saitta would not make a purchase until he had examined samples, they arranged a meeting for approximately 3:00 that afternoon at George's Restaurant (Tr. 10).

Howard drove his Cadillac to this meeting, arriving at approximately 3:00 p.m. (Tr. 11, 19-20, 35). After Saitta and Carter joined Howard in the restaurant, he gave Saitta the key to a room in a motel adjacent to the restaurant and told him that the counterfeit bills were under the mattress (Tr. 11-12). After examining twelve sample bills in the motel room and determining that they were counterfeit, Saitta returned to the restaurant and agreed to purchase $200,000 worth for $24,000 (Tr. 12-13). As Howard was making delivery later that evening in another vehicle, agents arrested him and seized two other vehicles that had been used to transport the money (Tr. 15, 29). An agent then accompanied Howard to his mother's home, recovered the remainder of the counterfeit bills, and seized Howard's Cadillac (Tr. 28-30, 86).

Howard admitted that he placed the counterfeit samples in the motel room and that he drove his Cadillac to the 3:00 p.m. meeting at George's Restaurant, but he claimed that he used his pick-up truck to transport the money there at approximately 1:00 p.m. (Tr. 125-126). The motel registration, however, showed that he had rented the room at about 3:30 p.m.[1]

The petition presents constitutional claims that could have been, but were not, raised by petitioners' counsel in the court of appeals. There being no exceptional circumstances, there is no occasion for this Court to consider these claims (see, *e.g., Neely* v. *Eby Constr. Co.,* 386 U.S. 317, 330; *Lawn* v. *United States,* 355 U.S. 339, 362-363, n. 16), which are in any event insubstantial and do not warrant review by this Court on their merits.

Petitioners' contention (Pet. 9-10) that the forfeiture provision of 49 U.S.C. 782 embodies the concept of deodand and takes private property for public use without just compensation, in violation of the Fifth Amendment, was explicitly rejected by this Court in *Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 416 U.S. 663, 680-690.

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[1]After petitioner Howard had testified that he registered in the motel room at about 1:00 p.m. (to reserve the room for a friend who was coming that evening, in whose name he registered the room) (Tr. 126, 131), his attorney suggested that the registration card be obtained and put in the record (Tr. 132) and agreed to have it obtained and made part of the record without further inquiry (Tr. 155). The district court concluded that the registration time of 3:30 shown on the card impeached Howard's account and corroborated the government's theory. The record contains no explanation of the fact that the time of the registration was after the time of the meeting. One possibility is that Howard, who ate at the motel-restaurant complex every day and knew the motel clerk (Tr. 127-128, 132-133, 135), was permitted to obtain the key to the room on his way to the 3:00 meeting but, in haste, did not register for his friend until the meeting was over.

Petitioners also contend that the forfeiture is invalid under the Fourth Amendment because the agents seized the car without a warrant and without probable cause (Pet. 7-9).[2] This Court has held that the validity of a forfeiture is not affected by the validity of the prior seizure of the property subject to forfeiture. *E.g., United States* v. *One Ford Coupe,* 272 U.S. 321, 325; *Dodge* v. *United States,* 272 U.S. 530, 532. Thus, even if the seizure of the car violated the Fourth Amendment, petitioners' remedies would not include invalidation of the forfeiture.

In any event, the facts recited above amply demonstrate that the agents had probable cause to believe that Howard's car had been the situs of a sale of counterfeit bills and had been used to transport such contraband. Given probable cause, the Fourth Amendment did not require that the agents obtain a warrant in order to seize (but not search) Howard's car. See *Cardwell* v. *Lewis,* 417 U.S. 583, 593-596 (plurality opinion of Blackmun, J.); *Cooper* v. *California,* 386 U.S. 58.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1975.

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[2]Petitioner does not challenge here the district court's determination, upheld by the court of appeals, that the evidence in the forfeiture proceeding established grounds for the forfeiture (Pet. Exh. A).